

The record reviewed and considered by the Appeals Board is the same as that listed in the Award of the Administrative Law Judge dated November 29, 1993.

STIPULATIONS

The Appeals Board hereby adopts for purposes of this appeal those stipulations made before the Administrative Law Judge and listed in his Award dated November 29, 1993.

ISSUES

The issues presented by oral argument for decision by the Appeals Board were:

- (1) Nature and extent of claimant's disability;
- (2) The proper amount of unauthorized medical expense to be awarded.

The amount of temporary total disability benefits due and claimant's entitlement to future medical expenses were also issues considered and decided by the Administrative Law Judge. Neither issue was raised before the Appeals Board and the Appeals Board hereby adopts the Administrative Law Judge's finding that claimant is entitled to 156 weeks temporary total disability compensation benefits at the rate of \$187.84 per week and is to receive future medical treatment only upon proper application and a hearing after notice to all parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) Claimant is entitled to an award of benefits based upon 64.5 percent (64.5%) general body disability.

Claimant suffered an accidental injury arising out of and in the course of her employment on January 22, 1990, when a co-worker pulled down a rack of drinking glasses causing it to strike claimant between the shoulder blades. She was first seen by a family doctor and then by Dr. Thomas N. Jensen, an orthopedic physician. Claimant underwent a period of conservative treatment including physical therapy and anti-inflammatory medications. She has not returned to her employment with the respondent, Osawatomie State Hospital.

The parties argue for two extremely diverse conclusions. Respondent argues claimant should be limited to a functional disability award because she has refused to accept an accommodated position with respondent at a comparable wage. Claimant, on the other hand, argues that she is unable to engage in any kind of substantial gainful employment and is, therefore, entitled to a permanent total award. Claimant cites in support of her argument a recent decision by the Kansas Court of Appeals in Wardlow v. ANR Freight Systems, Inc., No. 69760 (designated for publication 12-30-93).

The Appeals Board does not find the argument by either party fully persuasive. Respondent argues that it should be entitled to the presumption found in K.S.A. 1992 Supp. 44-510e, because claimant could have returned to work at a comparable wage. The Appeals Board, however, finds that the offer of an accommodated comparable wage position does not, in this case, preclude an award of work disability because the new position was temporary and the accommodations did not appear to be practical.

The accommodated position offered by respondent was one delivering meals to the patients at Osawatomie State Hospital. The job required loading of a cart, delivery of the meals, return of the cart and trays, and cleaning of the cart. Claimant's work restrictions would, however, have prevented her from engaging in the repeated bending over to remove and replace trays at the lower levels of the cart. The restrictions would have precluded her from pushing the cart, at least in certain areas of the facility, and would have limited her ability to clean the carts. Respondent presented testimony that, although this was a job normally done by one person, they were willing to have another person go along with claimant to remove and replace the trays at the lower levels and to push the cart on the inclined portions of the hallways. Respondent also indicated it was willing to make other arrangements for the cleaning. In effect respondent indicated it was willing to have another person who could do the job by himself or herself go with claimant and assist her. Claimant, on the other hand, testified she had observed the offered job and that respondent frequently did not have enough staff to do the job with one person. Respondent frequently assigned cooks to deliver the meals.

In Locks v. Boeing Co., 19 Kan. App. 2d 17 (1993), the Court of Appeals found the presumption created by K.S.A. 1992 Supp. 44-510e to be a rebuttable one. In that case the Court considered evidence of the temporary nature of the post-injury job and evidence of a progressive type injury to be factors which may overcome the presumption. In this case the job offered by respondent was also only a temporary one. Because of the extent of accommodation required to allow claimant to perform the job, the Appeals Board is not persuaded that the job would have offered reasonable long-term employment. The evidence does not, therefore, establish that the presumption should apply.

The Appeals Board does not, on the other hand, consider the claimant to be permanently totally disabled as argued by her attorney. Although Dr. Wertzberger does testify that it appears to him that she does not comply with the criteria for being employable under the AMA description, he nevertheless, also states that with guidance and training there are some sedentary duties which he believes are available that claimant could perform. Mr. Longacre also gives testimony that he believes her to be unemployable. Nevertheless, he states that, in his judgment, she has lost 90 percent (90%) of her ability to perform work in the open labor market.

The Appeals Board does find claimant is entitled to work disability. In determining the extent of claimant's work disability, the Appeals Board must consider and weigh both claimant's loss of ability to perform work in the open labor market and a reduction in her ability to earn a comparable wage, taking into consideration her education, training, experience and capacity for rehabilitation. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). The expert medical testimony indicates claimant should be restricted to infrequent lifting of 25 to 40 pounds, repetitive bending no more than 12 to 24 times per hour, and limited activities in a captive position with her arms extended in front. The only functional impairment rating introduced was a nine percent (9%) rating by Dr. Wertzberger. In this case the Appeals Board finds that the evidence does support the conclusion that the claimant's ability to perform work in the open labor market has been reduced by ninety percent (90%). The testimony indicates the disability and restrictions resulting from the injury would leave open a substantial portion of the labor market. In claimant's case, however, other factors, unrelated to her injury, severely limit her access to the open labor market. She has, for example, been unable to pass either the GED or drivers license exam. As Mr. Longacre testified, the job opportunities available to claimant prior to her injury were quite limited. The appropriate calculation in this case, to determine loss of access to the open labor market is one which determines the extent, expressed as a percentage, the labor market available to her before the injury has been reduced by the effects of the injury. It appears this is the calculation Mr. Longacre has made.

The Appeals Board is also of the opinion that claimant's ability to earn a comparable wage has been reduced by 39 percent (39%). The Appeals Board agrees with the Administrative Law Judge's conclusion that the post-accident wage for the claimant is likely to be a minimum wage, or \$4.25 per hour. Her pre-injury wage was \$7.00 per hour which results in a 39 percent (39%) reduction in ability to earn a comparable wage. It is not necessary in all cases to weigh equally the loss of ability to obtain employment in the open labor market and the loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). The Appeals Board does, nevertheless, find it reasonable to do so in this case. The Appeals Board, therefore, finds that claimant is entitled to an award based upon 64.5 percent (64.5%) general bodily disability which is an averaging of the 90 percent (90%) loss of access to the open labor market and 39 percent (39%) reduction in ability to earn a comparable wage.

(2) Claimant is entitled to \$350.00 in unauthorized medical expense.

The Administrative Law Judge has, in this case, awarded \$525.00 in unauthorized medical expense. This appears to have been an oversight and the parties both agree that the award of unauthorized medical expense should be \$350.00.

AWARD

WHEREFORE, an award of compensation is hereby made which increases the award made by the Administrative Law Judge and, in accordance with the above findings, awards benefits to the claimant to be paid by the respondent, Osawatomie State Hospital, and the Kansas State Self Insurance Fund, for an accidental injury sustained on January 22, 1990.

The claimant is entitled to 156 weeks temporary total disability at the rate of \$187.84 per week or \$29,303.04 followed by 259 weeks at \$121.15 per week or \$31,478.89 for a 64.5 percent (64.5%) permanent partial general bodily disability making a total award of \$60,781.93. As of March 6, 1994, there would be due and owing to the claimant 156 weeks of temporary total disability compensation at \$187.84 per week in the sum of \$29,303.04 plus 59 weeks of permanent partial compensation at the rate of \$121.15 per week in the sum of \$7,147.85 for a total due and owing of \$36,450.89 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$24,331.04 shall be paid at \$121.15 per week for 200 weeks or until further order by the Director.

Future medical treatment for the claimant injuries compensated in this proceeding may be awarded upon a proper application and a hearing upon notice to all parties.

Unauthorized medical expense pursuant to K.S.A. 44-510(c) in the amount of \$350.00 are also awarded to the claimant.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

Costs of transcripts in the record are taxed against respondent and carrier as follows:

RICHARD KUPPER & ASSOCIATES	\$ 497.00
HOSTETLER & ASSOCIATES	\$ 623.55

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Based upon the credible evidence it appears claimant is essentially unemployable and, therefore, entitled to permanent total disability benefits. As opined by Dr. Wertzberger, claimant does not meet the criteria for being employable under AMA guidelines. Also, the testimony of vocational rehabilitation expert Monty Longacre indicates that claimant is unemployable. I would find the credible evidence essentially uncontroverted and that claimant is entitled to permanent total disability benefits.

BOARD MEMBER

cc: Gary L. Jordan, P.O. Box 623, Ottawa, Kansas 66067
J. Paul Maurin, P.O. Box 1216, Kansas City, Kansas 66117
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director

GRACE SAUNDERS

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DOCKET NO. 154,857

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GRACE SAUNDERS

Claimant

VS.

OSAWATOMIE STATE HOSPITAL

Respondent

AND

STATE SELF INSURANCE FUND

Insurance Carrier

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Docket No. 154,857

NUNC PRO TUNC ORDER

ON review of the Award entered by the Appeals Board in this case on March 16, 1994, it appears that there was a calculation error in the "Award" portion of the Appeals Board decision. That section of the Award is therefore amended to read as follows:

AWARD

WHEREFORE, an award of compensation is hereby made which increases the award made by the Administrative Law Judge and, in accordance with the above findings, awards benefits to the claimant to be paid by the respondent, Osawatome State Hospital, and the Kansas State Self Insurance Fund, for an accidental injury sustained on January 22, 1992.

The claimant is entitled to 156 weeks temporary total disability at the rate of \$187.84 per week or \$29,303.04 followed by 259 weeks at \$121.15 per week or \$31,377.85 for a 64.5 percent (64.5%) permanent partial general bodily disability making a total award of \$60,680.89. As of March 6, 1994, there would be due and owing to the claimant 156 weeks of temporary total disability compensation at \$187.84 per week in the sum of \$29,303.04 plus 59 weeks of permanent partial compensation at the rate of \$121.15 per week in the sum of \$7,147.85 for a total due and owing of \$36,450.89 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$24,230.00 shall be paid at \$121.15 per week for 200 weeks or until further order by the Director.

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Unauthorized medical expense pursuant to K.S.A. 44-510(c) in the amount of \$350.00 are also awarded to the claimant.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

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RICHARD KUPPER & ASSOCIATES	\$ 497.00
HOSTETLER & ASSOCIATES	\$ 623.55

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

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GRACE SAUNDERS

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